Supreme Court, U.S.
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NO. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, ET AL.,
Petitioners

v.

EXXON CORPORATION, ET AL.,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Justices of the Supreme Court of The United States:

COME NOW Exxon Corporation and Esso Tankers, Inc.,* Respondents (sometimes referred to jointly as "Exxon"), and file this their Brief in Opposition to the Petition for Writ of Certiorari filed herein and would respectfully show to the Court as follows:

* Exxon Corporation has numerous subsidiaries and affiliates. A complete listing of these entities will be provided under separate cover. Esso Tankers, Inc. is a wholly, but indirectly, owned subsidiary of Exxon Corporation.

STATEMENT OF THE CASE

The Petitioners Chick Kam Choo and her attorneys Benton Musslewhite and Joseph C. Blanks seek review of a decision of the United States Court of Appeals for the Fifth Circuit rendered on May 21, 1987, affirming the judgment of the United States District Court for the Southern District of Texas permanently enjoining the Petitioners pursuant to Sections 1651(a) and 2283 of Title 28, U.S.C., from prosecuting or commencing any actions against the Respondents in the courts of the State of Texas or any other state of the United States arising out of or related to the death of Leong Chong in Singapore in 1977. The opinion of the Fifth Circuit is published under the style of *Exxon Corporation v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987).

The central issue presented for review is whether the dismissal under the doctrine of *forum non conveniens* of a maritime action brought by a foreign claimant for the death of a foreign maritime worker occurring outside of the United States precludes litigation of the same claim in a state court and thus supports an injunction prohibiting such litigation under the relitigation exception of the Anti-Injunction Act, 28 U.S.C. § 2283.

A. Course of Proceedings and Disposition in the Court Below.

On March 14, 1978, Chick Kam Choo filed a civil action in the United States District Court for the Southern District of Texas styled CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, Deceased, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR,

LEONG CHOY FONG, and LEONG CHOY TAN v. EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC., in which a claim to recover for the wrongful death of Leong Chong was asserted.

On July 31, 1980, an Order of Dismissal and a Final Judgment was entered in the civil action, holding, *inter alia*, that Singapore law applied, that Plaintiff's decedent was not a Jones Act seaman as a matter of law, and that the action be dismissed under the maritime doctrine of *forum non conveniens* for further proceedings in the Republic of Singapore.

Chick Kam Choo did not file a timely appeal from the Court's Final Judgment of July 31, 1980, but acting through her attorney, Benton Musslewhite, filed instead a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the Final Judgment. This motion was denied on December 8, 1981, and a Notice of Appeal was filed. The district court's denial of relief under Rule 60(b) was affirmed in *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir. 1983). After a Petition for Rehearing and Rehearing En Banc were denied by the Fifth Circuit, Chick Kam Choo filed a Petition for Writ of Certiorari with this Court, which was denied on October 3, 1983. 464 U.S. 826 (1983).

On January 6, 1984, Chick Kam Choo, again acting through her attorney Benton Musslewhite, filed an Original Petition in the 270th Judicial District Court of Harris County, Texas, which was substantially identical to the Complaint filed in 1978 in the Southern District of Texas. The cause filed in state district court was removed to the Southern District of Texas, Houston Division, on

grounds of diversity of citizenship and alienage jurisdiction. The district court denied Chick Kam Choo's motion to remand the case, and granted Exxon's Motion to Dismiss. Notice of Appeal was field on June 12, 1984 and on July 8, 1985, the Fifth Circuit Court of Appeals reversed the district court, holding that the necessary subject matter jurisdiction was lacking and vacated the district court's judgment with instructions that the case be remanded to state court. *Chick Kam Choo v. Exxon,* 764 F.2d 1148 (5th Cir. 1985). The Order remanding the case was entered by the district court on August 16, 1985.

The Petitioners Benton Musslewhite and Joseph C. Blanks are the attorneys of record for Chick Kam Choo in the cause pending in the 270th Judicial District Court of Harris County, Texas. The claims asserted by the Original Petition filed in the state cause are substantially identical to the claims asserted in the original federal action which was dismissed in 1980. No attempt has been made to institute an action in the Republic of Singapore or in any other jurisdiction outside of the United States.

On February 11, 1986, the instant action was commenced in the Southern District of Texas. Exxon filed a Motion for Summary Judgment and Application for Permanent Injunctive Relief, which was granted by the Court on May 15, 1986. The judgment of the district court enjoining the Petitioners from prosecuting or commencing any action against the Respondents in the courts of the State of Texas or any other state of the United States arising out of or related to the death of Leong Chong in Singapore in 1977 was affirmed by the Fifth

Circuit on May 21, 1987 and rehearing *en banc* was denied on June 24, 1987.

B. Facts of the Case.

The civil action decided by the Southern District of Texas in 1980 and the cause now pending in the 270th Judicial District Court of Harris County, Texas, are essentially identical claims seeking to recover for the death of Leong Chong, who was killed while working onboard the M/V ESSO WILHELMSHAVEN while it was undergoing repairs at a shipyard in Singapore during March, 1977. The M/V ESSO WILHELMSHAVEN was at all relevant times a Liberian flag vessel owned by Esso Tankers, Inc. and operated by Exxon International, an unincorporated division of Exxon Corporation. Exxon and Esso Tankers were the Defendants in the original federal action and are the Defendnants in the cause pending in the Texas court. Thus, the parties in the two actions are identical.

In the Original Complaint, filed in the Southern District of Texas, the Plaintiff Chick Kam Choo, acting both individually and in representative capacities, sought to recover for the death of her husband Leong Chong under the Jones Act, the general maritime law, the Longshore and Harbor Workers' Compensation Act, the Death on the High Seas Act, and the wrongful death statutes of the State of Texas. Exxon filed a Motion for Partial Summary Judgment and to dismiss the action under the maritime doctrine of *forum non conveniens.* After extensive briefing and after hearing the arguments of both sides, the district court explicitly held that American law did not apply and granted Exxon's Motion for Partial Summary Judgment as to the claims presented

under the Jones Act, Death on the High Seas Act, the Longshore and Harbor Workers' Compensation Act, and the general maritime law of the United States. The Court granted a conditional dismissal of the foreign law claims on the grounds of *forum non conveniens*, provided that Exxon consented to the jurisdiction of the appropriate Singapore court. No attempt to commence an action in the courts of Singapore was made by Chick Kam Choo or her attorneys.

ARGUMENT

Introduction

In urging the Court to grant a Writ of Certiorari in this case, the Petitioners rely on three principal grounds: an alleged conflict between the Fifth Circuit in this case and the Ninth Circuit in the case of *Zipfel v. Halliburton*, 820 F.2d 1438 (9th Cir. 1987); an alleged conflict between the Fifth Circuit's opinion and cases of this Court holding that preemption of an area by federal law does not justify a federal injunction of a state court action; and an alleged conflict with cases of this Court holding that a *forum non conveniens* dismissal cannot have a preclusive effect sufficient to support injunctive relief under the relitigation exception of the Anti-Injunction Statute.

As will be demonstrated below, the conflicts relied upon by the Petitioners are for the most part illusory. The Ninth Circuit has pending before it in *Zipfel* a petition for rehearing and the factual and procedural situation with which *Zipfel* deals is in several respects different from the situation dealt with by the Fifth Circuit in *Chick Kam Choo*. Although the *Zipfel* decision,

as it now stands, can be interpreted as being in conflict with the Fifth Circuit's position in *Chick Kam Choo* on the relitigation injunction point, it is also susceptible to interpretations that may eliminate the conflict. The Petitioners also attempt to find a conflict between the holding below and cases such as *Atlantic Coast Line v. Brotherhood of Railway Workers*, 398 U.S. 281 (1970), by misreading the decision below as being based entirely on the preemption of state law by federal law in a maritime case, rather than the preclusive effect of the prior federal judgment. Finally, cases such as *Parsons v. Chesapeake Railway Co.*, 375 U.S. 371 (1963), dealing with the nonpreclusive effect of domestic *forum non conveniens* dismissals are clearly distinguishable from *Chick Kam Choo*.

I. THE *ZIPFEL* AND *CHOO* CASES ARE NOT NECESSARILY IN CONFLICT.

Chick Kam Choo involves a wrongful death claim arising out of the death of a ship repairer aboard an ocean-going vessel that was undergoing repairs in Singapore. The claim was brought in the Southern District of Texas under the Jones Act, the Longshore and Harbor Workers' Compensation Act, the Death on the High Seas Act, the general maritime law and the laws of the State of Texas against the vessel owner, Esso Tankers, Inc., and the vessel operator, Exxon Corporation. In 1980, summary judgment was entered holding that the law of the Republic of Singapore controlled and dismissed the claims brought under the Jones Act, Longshore and Harbor Workers' Compensation Act, Death on the High Seas Act, and the general maritime law of the United States. The case was then dismissed under

the maritime doctrine of *forum non conveniens* for further proceedings in Singapore. No appeal was taken from the Final Judgment.[1] In 1984, Madame Choo and her attorneys, alleging substantially identical theories, filed "Plaintiff's Original Petition" based upon the same cause of action and same nucleus of operative facts in state district court in Houston.[2] Exxon sought injunctive relief in an independent action in federal district court under the All Writs Statute, 28 U.S.C. § 1651(a), and the relitigation exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, to vindicate its position under the prior federal judgment by enjoining further litigation of the claim in the United States. It is the Fifth

1. Under the Fifth Circuit precedent, the choice of law determination by the federal district court is of key importance. As in *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 390-91 (5th Cir. 1983), and *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982), no claim for relief under foreign law was stated in Petitioner's federal pleadings. As the Fifth Circuit succinctly stated in *Vaz Borralho*:

> Because the appellants asserted claims under American law only, once the district court determined that American law did not apply, "it could have properly dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, and, if deposition and affidavits were considered [as they were in this case] have granted a summary judgment under Rule 56." *Chiazor*, 648 F.2d at 1028 n.7. [citing additional authority]

696 F.2d at 391. Mr. Musslewhite was counsel of record for Plaintiff in both *Vaz Borralho* and *Chiazor*.

Dismissals under Rule 12(b)(6) and Rule 56 are clearly *res judicata* under well settled precedent. *Federated Department Stories, Inc. v. Moite*, 452 U.S. 394 (1981); *Bell v. Hood*, 327 U.S. 678 (1946).

2. Because Petitioners attempted to plead new theories on the same cause of action as had been dismissed under a final, albeit conditional judgment, the additional theories were precluded by doctrines of merger and bar. Claim splitting does not afford a defeated litigant a trial de novo upon the same cause of action.

Circuit's affirmance of the permanent injunction granted by the district court prohibiting relitigation in state court for which review is being sought.

While procedurally similar to *Choo*, the *Zipfel* case presents a slightly different factual situation. *Zipfel* involves claims for personal injury and death arising out of an airplane crash at an airport in Indonesia in 1981. The claimants and claimant's decedents in *Zipfel* were offshore oil workers employed aboard an offshore drilling vessel and at the time of the crash were being transported to the vessel. In *Zipfel* the trial court held that the Jones Act did not apply to the foreign claimants, but did to the American claimants, and dismissed the entire case conditionally under the doctrine of *forum non conveniens* for further proceedings in either Singapore or Indonesia. A substantially identical action was commenced in the courts of the State of Texas more or less contemporaneously with the federal action. Because of the existence of the pending Texas action, the defendants requested the federal district court in San Francisco to grant a permanent injunction prohibiting further litigation of the dismissed claims in state court as part of their relief in the main action.

The analytical approaches taken by the two Courts of Appeal to the relitigation injunction issue differ markedly. Judge Gee, speaking for the Fifth Circuit, began with the proposition that even though American substantive law did not control the claims of Madame Choo, the claims that remained after the district court's *forum non conveniens* dismissal were admiralty tort claims. 817 F.2d at 309. That being the case, he concluded after a careful and thorough consideration of the preemptive effect of federal law in admiralty and maritime matters that the

state court was bound to follow federal maritime law, including the maritime doctrine of *forum non conveniens*. Given the absence of different objective facts, the state court was bound by the federal court's judgment dismissing the case on the basis of *forum non conveniens*, notwithstanding the fact that Texas in all likelihood does not recognize the *forum non conveniens* concept in its own jurisprudence. As far as the Fifth Circuit was concerned, the case turned on direct estoppel:

> We conclude that once a court of competent jurisdiction has squarely passed on an issue fairly mooted between the same parties, on the merits of the cause or otherwise, that issue may not be relitigated. 817 F.2d at 314.

In *Zipfel*, the Ninth Circuit affirmed the trial court's choice of law determination and *forum non conveniens* dismissal (except for those claims controlled by U.S. law), but vacated the injunctive relief granted by the trial court to prevent the claimants from continuing to prosecute their claims in the Texas courts. In so doing, the Ninth Circuit virtually ignored any possible *res judicata* effect the *forum non conveniens* dismissal or the underlying factual findings and choice of law determination might have even though its cases acknowledge that the relitigation exception to the Anti-Injunction Act allows federal courts to enjoin state court proceedings to protect the *res judicata* effect of their judgments. *Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425, 1427 (9th Cir. 1986), *citing Midkiff v. Torn*, 725 F.2d 502, 504 (9th Cir. 1984). Instead, the Ninth Circuit focused on language in these cases that a relitigation exception was available only if the federal judgment was *on the merits*,

and without analysis or authority concluded that no judgment on the merits had been rendered since the defendants had only prevailed on a procedural point pertaining to the propriety of the prosecution of the foreign seaman's lawsuits in a United States district court. 802 F.2d at 1449. The Court also seemed to ignore the fact that the *forum non conveniens* dismissal transcended narrow parochial concerns regarding the relative convenience of available domestic forums and constituted a determination as to whether *any* court in the United States should entertain such a cause.

While the meaning of a "judgment on the merits" seems to have become obscure, it generally is taken to mean that the judgment has some preclusive or *res judicata* effect. Fed. R. Civ. P. 41(b). It is well settled that a Rule 12(b)(6) or Rule 56 dismissal has a *res judicata* effect. *Federated Department Stores, Inc. v. Moite*, 452 U.S. 399 (1981); *Angel v. Bollington*, 330 U.S. 183 (1947); *Bell v. Hood*, 327 U.S. 678 (1946). *See, Harper Plastics v. Amoco Chemical Corp.*, 657 F.2d 939, 943 (7th Cir. 1981). Under the Fifth Circuit's analysis a judgment dismissing a foreign litigant under the maritime doctrine of *forum non conveniens* has the preclusive effect sufficient to prevent the continued litigation of the claim in the United States and on that basis can be said to be "on the merits." The Ninth Circuit in *Zipfel* never addresses the issue.[3]

A petition for rehearing has been filed with the Ninth Circuit on the relitigation injunction point and the Court

3. Under the Ninth Circuit approach, the dismissal of a foreign seaman's claim under the doctrine of *forum non conveniens* for resolution outside the United States is a meaningless exercise of judicial effort since the judgment has no preclusive effect.

has requested a response. Thus, it is conceivable that the Ninth Circuit will reconsider its position and elimiate any theoretical conflict that may exist with the Fifth Circuit.

Even if the Ninth Circuit does not reconsider its position on rehearing, there is a question of whether the *Zipfel* decision actually creates a conflict between the circuits as to whether the dismissal on *forum non conveniens* grounds of a maritime action by a federal court for litigation in a foreign forum precludes the relitigation of the same claims in a state court. The *Chick Kam Choo* case involved the wrongful death of a foreign shipyard worker on a vessel lying afloat in a Singapore harbor. The *Zipfel* case involves an air crash on land which resulted in the death and injuries of offshore oil workers who were being transported to a drilling vessel located off Indonesia. In *Chick Kam Choo,* it is clear that the claimant retained an admiralty tort claim, albeit a claim controlled by Singapore law and assertable only outside the United States. 817 F.2d at 309, 321-325. The question of whether any admiralty tort claims remained in *Zipfel* after the dismissal of the Jones Act claims was never addressed by the Ninth Circuit in its opinion. To the extent that the claimants in *Zipfel* retained a residuum of non-maritime claims after the dismissal of their Jones Act claims, the holdings in the two cases with regard to the relitigation injunction are distinguishable.

As Judge Gee pointed out below, if maritime claims are dismissed by a federal court under the maritime doctrine of *forum non conveniens* for litigation in a nation other than the United States, any subsequent litigation of such claims in a state court, including the issue of the *forum non conveniens* dismissal, must be controlled by federal maritime law. Implicit in this is the conclusion that

if the claims dismissed by the federal court are not maritime in nature, but involve claims over which a state court can exercise independent, concurrent jurisdiction with the federal courts, the state court would not necessarily be bound by federal maritime law. To the extent *Zipfel* is read as leaving non-maritime claims remaining after the dismissal of the Jones Act claims, the conflict between *Zipfel* and *Chick Kam Choo* is not sufficiently direct to justify the granting of a Writ of Certiorari.

However, if the residuum of claims in both *Choo* and *Zipfel* consists of admiralty tort claims, there appears to be a direct conflict between the two decisions and the nature and extent of such conflict must be examined to determine if certiorari is appropriate. It is impossible to make this examination until the Ninth Circuit has acted on the pending petition for rehearing.

II. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.

A. Injunction Below Was Not Predicated on a Theory of Federal Preemption.

Petitioners argue that the decision below is in conflict with the decisions of this Court holding that there is no exception to the Anti-Injunction Act to allow federal courts to enjoin state court proceedings dealing with "an area preempted by federal law." *Atlantic Coast Line R. Co. v. Engineers,* 398 U.S. 281, 294 (1970). Petitioners' argument, however, is based on a distortion of the decision below. The permanent injunction granted by the district court which is at issue here is expressly based on the relitigation exception of Section 2283. The foundation of the injunction was the final judgment entered by the federal court in 1980 dismissing all claims

and theories under Chick Kam Choo's federal pleadings and dismissing those not otherwise adjudicated for resolution under the laws and in the courts of the Republic of Singapore pursuant to the maritime doctrine of *forum non conveniens*. The injunction was not based on the notion that federal law preempts state law in admiralty and maritime matters and that as a result federal courts have the right to prevent state courts from hearing admiralty and maritime matters. Such an approach would fly into the teeth of the Savings to Suitors Clause. Preemption as a concept became important in the decision below as a means of determining the preclusive effect of the maritime *forum non conveniens* dismissal contained in the prior federal judgment. An injunction to prevent the relitigation of an issue can issue only if there is an underlying judgment that would preclude another tribunal from deciding the issue again and perhaps differently. To make this determination, the appellate court necessarily had to decide if the state court was free to resolve the *forum non conveniens* issue differently from the federal court. To do so, the court of appeals properly considered the relationship between federal and state law as applied to maritime cases. The preemption cases cited by the Petitioners are in no way directed to the articulation of a preemption test in the maritime field (or any other field) to enable courts to determine the preclusive effects of federal judgments. Therefore, they do not conflict with the Fifth Circuit's decision in *Choo*.

B. Domestic *Forum Non Conveniens* Cases are Distinguishable.

Petitioners argue that the *Choo* decision is in conflict with decisions of this Court, as well as lower courts, holding that *forum non conveniens* determinations are

procedural and without *res judicata* effect, relying on *Parsons v. Chesapeake Railway Co.*, 375 U.S. 371 (1963) and *Missouri v. Mayfield*, 340 U.S. 1 (1950), among others. These cases are distinguishable and in no way inconsistent with the application of the direct estoppel by judgment rule employed by the Fifth Circuit below. *See Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3rd Cir. 1977). *Parsons*, for instance, was an FELA case subject to the independent and concurrent jurisdiction of both state and federal courts. As Judge Gee points out below, in such a situation each court system is free to apply its own approach to *forum non conveniens*. 817 F.2d at 319. Moreover, the *Parsons* and *Mayfield* cases, as well as the other cases relied on by the Petitioners, all involve purely domestic cases with all of the alternative forums located in the United States. The range of objective facts that are relevant in a domestic *forum non conveniens* context, such as docket congestion, are much broader and more subjective than the factors that govern international *forum non conveniens* determinations. There is a difference of kind rather than degree between a determination as to which of two available courts in this country should adjudicate a domestic controversy and a determination of whether a claim brought by foreign claimants regarding an occurrence which took place outside of this country should be adjudicated in our courts.

CONCLUSION

Petitioners complain that if the decision below is allowed to stand, it will affect any case which a maritime plaintiff files in state court in that the state court will be forced to apply federal maritime law and, in the proper case, federal maritime *forum non conveniens* principles. (Petition, p.

23) The fact that state courts are bound to apply federal maritime law in maritime cases brought before them is hardly a novel idea. *See Offshore Logistics v. Tallentire*, 471 U.S.____, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986). However, Petitioners' concern does point up the significance of the Fifth Circuit's decision in *Chick Kam Choo*. Over the last several years, numerous claims have been asserted in our federal courts by foreign maritime claimants seeking to recover for personal injuries and deaths resulting from maritime activities outside the territorial waters of the United States. In response, the various courts of appeal have refined traditional maritime *forum non coveniens* concepts in an effort to determine which of these foreign maritime claims should be returned to the countries in which they arose and which should be resolved in the United States. *See e.g., Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983); *McClelland Engineering v. Munusamy*, 784 F.2d 1212 (5th Cir. 1986). However, many foreign claimants are not returning to the appropriate national forum after being directed to do so by our federal courts. Instead they are more and more turning to state courts and particularly state courts that refuse to recognize the doctrine of *forum non conveniens*. E.g. *Kassapas v. Akron Shipping Agency, Inc.*, 485 S.W.2d 565 (La. Ct. App., 5th Cir.), *writ denied*, 488 S.W.2d 203 (La. 1986), *cert. denied*, ____U.S.____, 93 L.Ed.2d 372 (1987). We are thus faced with the possibility of the development of a dual system of maritime law in which similar claims are dealt with in fundamentally different ways by our federal and state courts. The decision below, when taken together with this Court's recent decision in

Tallentire, clearly stands for the proposition that the matritime law of the United States is to applied consistently and uniformly, regardless of whether the jurisdiction of our state or federal courts are invoked. For this reason, the decision in *Exxon Corporation v. Chick Kam Choo* should be left undisturbed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the Petition for Writ of Certiorari was received by me through the United States mail on September 24, 1987 and that I have this day served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon Benton Musslewhite, 609 Fannin, Suite 517, Houston, Texas 77002 and Joseph C. Blanks, 909 Laurel, Beaumont, Texas 77701, attorneys for Petitioners by placing the same in the United States mail, Certified Mail, Return Receipt Requested, in a properly addressed envelope addressed to Mr. Musslewhite at the above address on this 26th day of October, 1987.

James Patrick Cooney

JAMES PATRICK COONEY

Sworn to and subscribed to before me the undersigned authority, this _____ day of October, 1987.

_____

Notary Public, in and for
The State of Texas

My Commission Expires: _____